

RECEIVED

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

OCT 09 2004

Appeal of Selectmen of the Town of Nottingham
Docket No. 04-15-WC

**THE TOWN OF NOTTINGHAM SELECTMEN'S RESPONSE TO USA SPRINGS'
LETTER DATED SEPTEMBER 29, 2004 SEEKING RECUSAL OF COUNCILOR
JAMES VAROTSIS**

The Selectmen of the Town of Nottingham ("Nottingham"), respond to USA Springs' Letter dated September 29, 2004 seeking recusal of Councilor James Varotsis by stating that the letter fails to demonstrate that recusal is necessary or that any improper or prejudicial conduct has taken place.

Introduction

By letter of September 29, 2004, USA Springs, Inc., through its counsel Armand Hyatt, asserted that Council Member James Varotsis should be instructed to recuse himself from these proceedings. The letter, while, in the most part, correctly recounting what transpired at the September 8, 2004 Council meeting, misperceives the regulations of the Water Council's administrative process and the New Hampshire law of recusal. Mr. Varotsis did not act inappropriately at the meeting and recusal is neither required nor appropriate.

Recusal of a Member of the Council is a Matter to be Resolved by the Conscience of the Councilor with the Advice of the Council and the Burden of Proof is on USA Springs to Prove it is Required.

Under New Hampshire law, "administration officials who serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result". Webster v. Town of Candia 146 N.H. 430, 441 (2001). The burden of proof is upon the party seeking recusal to present sufficient evidence to rebut the presumption. Webster at 442. "A

motion for recusal should be supported by a sufficient affidavit of personal bias or other disqualification". Webster at 442. USA Springs has submitted no affidavit or any other evidence to support disqualification. Reasons for disqualification do not include ... knowledge of facts gained in the performance of the member's official duties. The fact that Mr. Varotsis' received an unsolicited communication is not grounds for disqualification. Moreover, the Council members are appointed under RSA 21-O:7 and are specifically appointed to represent particular perspectives and to bring their own experiences to bear in review of matters coming before the Council. It is important that they serve and not recuse themselves unnecessarily. Thus, a Council member should not disqualify himself unless, in his own conscience, he believes he could not reach a just result.

USA Springs has Failed to Bring any Information to the Council to Suggest Any Bias or Prejudice as a Result of Comments by Mr. Varotsis or Any Other Council Member.

Since the undersigned attended the Council hearing on September 8, 2004, I can submit to the Council that I observed no conduct by Mr. Varotsis or any member of the Council or by the Council as a whole which reflected any prejudgment, bias or improper discussion with respect to the USA Springs appeal. In fact, the conduct of the Council and its members was totally appropriate. The references to the September 8 meeting, as set forth in the letter of Mr. Hyatt (who did not attend the meeting), do not indicate any improper conduct. Despite USA Springs efforts to argue to the contrary, Commissioner Varotsis actually fulfilled his legal duty by disclosing to the Council his receipt of an unsolicited communication, one that was authored by USA Springs itself. Therefore, it is curious that USA Springs would accuse Mr. Varotsis of

improperly receiving a letter which was authored by USA Springs and disclosing the communication when the Council's regulations required him to do so.¹

Finally, USA Springs simply misunderstands what occurred at the Council meeting with respect to the evidence before the Council. Mr. Varotsis properly followed the regulations by notifying the Council Chairman of the communication which he received and submitting a copy of the same as required by the regulations. The Council did not receive the document as evidence but simply noted that its record would reflect that the document was discussed. There is no indication that the information contained in the letter authored by USA Springs will be considered as evidence or that USA Springs would suffer any prejudice if it was received as evidence.

Simply put, the observations brought forward by USA Springs, Inc. do not rise to the level of proving any bias or improper conduct which could prejudice USA Springs, Inc. in this proceeding. The questions attributed to Mr. Varotsis simply reflect that he was seeking information on the status of the project. There is absolutely no evidence that he has prejudged the appeal or that he has formed any opinions of the project. Mr. Varotsis did nothing wrong. He reported having received the letter and made the substance available to the Council as is required by the regulations. The only thing that is remarkable about this incident is that USA Springs, Inc. would interpret it as a basis for trying to force Councilor Varotsis to recuse himself from these proceedings.

¹ It is noted that USA Springs has accused every reviewer of the project of acting improperly. It has accused the DES staff, the Nottingham Planning Board, and now the Water Council.

Respectfully submitted,

TOWN OF NOTTINGHAM SELECTMEN

By its attorneys,
Nelson, Kinder, Mosseau & Saturley, P.C.

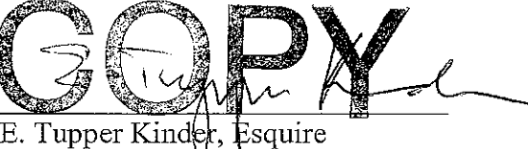
Dated: October 6, 2004

COPY

E. Tupper Kinder, Esquire
99 Middle Street
Manchester, NH 03101
Tel. (603) 647-1800

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, first class, and postage prepaid Mark Beliveau, Esquire, Armand Hyatt, Bill McCann, S.O.G., Assistant Attorney General Richard Head, and Assistant Attorney General Anne M. Edwards, Esquire.

COPY

E. Tupper Kinder, Esquire

G:\Cases\Noting\NOTING.001\CaseDesk\Pleadings\NOTICE OF APPEAL\Water Council Appeal\Response to USA Springs.10.06.04.doc